Supreme Court U.S.
FILED

No. ___ 051454 MAY 11 2006

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IN THE

Supreme Court of the United States

JAMES M. ERIKSON, *et al.*,
Petitioners,

v.

FARMERS GROUP, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court properly considered the allegations contained within the complaint in the light most favorable to the nonmoving party for purposes of a Fed. Rule of Civ. Proc. R. 12(b)(6) dismissal, when the court clearly ignored paragraphs one through seven (1-7), of the second amended complaint (Appendix F p. 56a-58a) (Order of 11-20-03 Appendix D p. 16a-20a).

2. Whether the cause of action (and statute of limitations) commenced upon the discovery of the frauds concealed by the third party insurance company; and if not, Whether equitable tolling should apply to the state law statute of limitations when a third party successfully concealed the fraud; and as a result, precluded the knowledge of the cause of action against the third party until said discovery?

3. Whether the allegations that, "The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law," ¶ 1 Second Amended Complaint (Appendix F p. 59a-60a and 63a-65a) contained a sufficient allegation of "ongoing pattern or practice" and "open continuity" for purposes of RICO in order to survive a 12(b)(6) Motion to Dismiss?

LIST OF PARTIES TO THE PROCEEDINGS

The *Petitioners* in this action are James Erikson and Patrick Kilgallen.

The *Respondents,* In addition to Farmers Group, Inc. and affiliated companies, The Farmers Insurance Group of Companies and affiliated companies were also named as defendants in the district court. The parties in the caption were parties on appeal to the Tenth Circuit. The parent company of Defendant Farmers Group, Inc., is Zurich Financial Services, whose stock is traded on the London and Zurich stock exchanges. Zurich Financial Services owns more than 10% of the stock of Farmers Group, Inc., according to the corporate disclosure statement filed of record with the district court, dated April 24, 2003 and was not named as a party.

Only the parties named in the caption were parties on appeal to the Tenth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, James Erikson and Patrick Kilgallen, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The original opinions of the court of appeals denying Petitioners' Appeal, 151 Fed.Appx. 672 (10th Cir. 2005), Petition for Rehearing En Banc and the order of the district court granting Defendants' motion to dismiss (Appendix B p. 3a and Appendix D p. 14a-25a) are unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on October 18, 2005. A timely petition for rehearing was filed on November 29, 2005. The petition for rehearing was denied and entered on December 12, 2005. On March 16, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including May 11, 2006. The jurisdiction of This Court is invoked under 28 U.S.C. § 1254(1).

CODES AND REGULATIONS INVOLVED

The relevant provisions of the Oklahoma Statutes, 12 Okl. St. § 95 (3), and are set forth in the appendix to this petition at Appendix H p. 78a.

12 Okl. St. § 2004.1
12 Okl. St. § 3226
43A Okl. St. § 1-109
18 U.S.C. § 1961(5)
18 U.S.C. § 3575(e)

STATEMENT OF THE CASE

Petitioners were involved in a "fender-bender" type accident in 1997 and suffered relatively minor personal injuries. Suit was timely filed against the Tortfeasor (Dana E. Davis) in a state court personal injury action, claiming inter alia, injuries restricted to head, neck, back, arm and blood pressure. The Tortfeasor was insured and represented by several 'in-house' attorneys employees of the Tortfeasor's insurance company, Farmers Group, Inc., the Appellee herein. (The insurance company was not named as a party to the state court personal injury action and Appellants had no known cause of action against said insurance company at that point). The insurance company, Farmers, is the third largest Personal Lines Property & Casualty insurance group conducting the business of insurance throughout the country.

During the state court personal injury trial, the insurance company attorney made reference to Petitioners' confidential medical information in open court by way of cross-examination but not by way of introduction into evidence. Petitioners' objections to the irrelevant medical references were overruled by the state trial court. The tortfeasor prevailed at the state court trial and the subsequent appeal to the Oklahoma Civil Court of Appeals.

Subsequent to the conclusion of the state court personal injury trial, on August 14, 2000, Appellant James Erikson received a single fax copy of a previously unknown letter sent to his medical provider from Farmers Group of Insurance Companies which demanded all medical records (every page) of Mr. Erikson. The letter was on letterhead from Dobbs and Middleton, "not a partnership," and "Employees of the Litigation Department of the Farmers Insurance Group of Companies," (according to the Farmers Insurance letterhead on which the letter was printed), representing that due to a state court order waiving medical privilege, Farmers and their attorneys were entitled to all medical records, not restricted in any way. At this point, Appellant Erikson notified his attorney of his discovery and state court subpoenas were issued and served upon the tortfeasor (Ms. Davis) and the insurance company attorneys (Dobbs and Middleton) as required by Oklahoma's subpoena statute. 12 O.S. § 2004.1 (B)(1).

Subsequently, on or about September 19, 2000, after a second subpoena was served upon the insurance company's attorneys, the insurance company attorneys reluctantly disclosed some 56 letters (apparently a form letter still used to this day) developed and sent out by the insurance company staff, which were sent to all or most of the Petitioners' medical providers through U.S. Mail and/or over telephone wires/facsimile transmissions during an unknown time period, which had been sent out without notice to the state

court or Petitioners. (In Oklahoma State Court, parties are required to be timely served notice of subpoenas. All 56 letters to the medical providers sent by the insurance company represented that the insurance company was entitled to "all medical records (every page)." Further, the recipients of the letters were threatened with being subpoenaed to testify at the state court trial if the records were not provided. The letters in possession of the Appellants appear to have been sent by one of many secretaries of the law firm, on behalf of the insurance company employees and attorneys, as a matter of regular policy and practice by the insurance company against all Plaintiffs who claim personal injuries against parties insured by Farmers in a law suit. It is unknown whether these were all letters sent by the insurance company, as all letters are held by the insurance company and no discovery was conducted after the insurance company's 12(b)(6) motion to dismiss was filed. Apparently, (at least in this case), the insurance company has a wide spread and ongoing pattern and practice of exploiting the confidential medical records against the litigants procured in secret and in violation of medical privacy, as a means of profiting by collecting insurance premiums and avoiding paying claims.

On August 14, 2002, exactly two years after the discovery of the first fraudulent letter discovered by James Erikson and well within the RICO four year statute of limitations, both Patrick Kilgallen and James Erikson filed their complaint at the Western District of Oklahoma against the Defendants. Appellants relied on Oklahoma's two-year statute of limitations which clearly and unambiguously spells out that the statute of limitations commences upon the discovery of fraud. "It is established that the two-year limitation period in § 95 Third will commence to run when the claim accrues, and the claim accrues when a litigant first could have maintained his claim to a successful conclusion." See *Sherwood Forest No. 2 Corp. v. City of Norman*, 632 P.2d 368, 370 (Okla. 1980). (*See also* In re 1973 John Deere 4030 Tractor, 1991 OK 79,

816 P.2d 1126, 62 OBJ 2437 (Okla. 1991)). However, unlike the victim in 1973 John Deere Tractor where the stolen property was restored, once the Petitioners' medical privilege was breached, the Petitioners' medical confidentiality cannot be restored.

The Defendant filed a FRCP R. 12(b)(6) Motion to dismiss which was granted by the district court for exceeding Okla homa's two year statute of limitations against the invasion of privacy related state tort claims. The court ruled that the RICO claim did not allege an ongoing pattern of racketeering activity and could not withstand a 12(b)(6) motion and dismissed the case in its entirety, apparently disregarding paragraph 1 of the Second Amended Complaint which clearly and unambiguously alleged: "The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law," ¶ 1 Second Amended Complaint Appendix F p. 56a.

Petitioners timely filed an appeal with the Tenth Circuit which affirmed and essentially adopted the opinion of district court, affirming the district court's holding that Appellants knew of their injury at the time of the state court trial. Neither of the two cases cited by the lower courts involved a justiciable concealment of the cause of action by the tort-feasor as applies in Oklahoma. Additionally, the Petitioners timely petitioned for Rehearing En Banc but was denied by the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit in this case—a decision that is squarely contrary to a litiney of well established decisions of This Court requiring that *Federal Rule of Civil Procedure 12(b)(6)* motions to dismiss must be treated in the light most favorable to the nonmoving party. (See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 103 P.U.R.

4th 513, 109 S.Ct. 2893, 106 L.Ed.2d 195, 57 USLW 4951, RICO Bus.Disp.Guide 7237 U.S.Minn. Jun 26, 1989; *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), 104 S.Ct. 2229, 81 L.Ed. 2d 59; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This case presents an opportunity to clear up any remaining question of what is to be considered as true or favorable to the nonmoving party in a FRCP R. 12(b)(6) motion to dismiss.

The district court and affirmed by the Tenth Circuit, held that Oklahoma's two-year statute of limitations ran on the Petitioners' state law claims one and a half (1½) months prior to filing their complaint (June 28, 2002). The court also found that "For purposes of the Motion to Dismiss, the court accepts the following "General Allegations" of the Second Amended Complaint as true (paragraph numbering as in original): 8. On or about October 7, 1995, James Erikson and Patrick Kilgallen. . ." (11-20-03 order Appendix D p. 16a). However, the district court inexplicably starts on the eighth (8th) paragraph, and through the eighteenth (18) paragraph and disregarded the first seven paragraphs (1-7) of the second amended complaint as well as paragraphs 19 through 53 and excluded the prayer for relief as true, as well as the attached letter at issue, which showed said letter was faxed to James Erikson on August 14, 2000, and started Plaintiff James Erikson's statute of limitations running upon his receipt of same. The Defendant has never controverted the date of the discovery of the fraudulent letter on August 14, 2000.

Appellants believe that in order for the district court to construe the pleadings in the light most favorable to them as the nonmoving party, the entire complaint must be taken into consideration, not just a select few paragraphs out of the complaint. (In this case the court construed paragraphs eight through eighteen as true). The complaint in its entirety had 53 paragraphs and attachments including the fraudulent letter by the insurance company, which was unknown to Appellant until August 14, 2000. The fact of this first discovery was uncontroverted throughout. Instead, the Defendant insur-

ance company has focused on the date medical records may have been discovered by Petitioners, rather than the discovery of the frauds and cause of action that was intentionally concealed from the Petitioners by the insurance company.

The letters and cause of action against the third party insurance company did not exist at all for the Petitioners prior to August 19, 2000, the earliest for Appellant Erikson on August 14, 2000 as to the one letter discussed infra.

Additionally, focusing on ¶¶ 17 & 18. Of the Second Amended Complaint and affirmed by the Tenth Circuit, the district court found that Petitioners' allegations did not sufficiently establish a pattern of racketeering activity required for a RICO violation, discussed more fully supra. 11-20-03 10-18-05 orders (Appendix D p. 14a-25a and Appendix C p. 4a-13a). The courts apparently overlooked ¶ 1 of the Second Amended Complaint which alleged: ". . . The Defendants have conspired; or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law." (¶ 1 Second Amended Complaint Appendix F p. 56a-57a)

Appellants submit that the Second Amended Complaint in its entirety demonstrate that if the court had taken the evidence in the light most favorable, the Petitioners should have survived a 12(b)(6) motion to dismiss, since attached to the Second Amended Complaint was the August 14, 2000 letter with the facsimile date stamp reflecting August 14, 2000, attached to their Second Amended Complaint, as well as in their responses to the Motion to Dismiss, clearly showed that August 14, 2000 was the first time Plaintiff Erikson could have been aware of a claim against the insurance company. If taken in the light most favorable, Appellants submit that not only should the court have assumed that August 14, 2000 was the de facto date as a result of the

conflict between the parties as to the proper date the statute of limitations started to acrew, but there was an allegation of ongoing pattern for purposes of RICO which also should have survived a 12(b)(6) motion.

The issue in reviewing the sufficiency of the complaint is not whether the Petitioners will prevail, but whether the Petitioners are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982) Dismissal under Federal Rule 12(b)(6) (identical to Oklahoma Statues) is a *"harsh remedy which must be cautiously studied, not only to effectuate the spirit of liberal rules of pleadings but also to protect the interest of justice."* *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989).

A. Statute of Limitations cannot accrue until Petitioners could first maintain an action to successful conclusion.

Appellants had no cause of action against the 3rd party insurance company until they discovered the fraudulent letters sent to their medical providers. Appellants were involved in a relatively minor rear-end accident and suffered soft tissue injuries and property damage. As is common in liability insurance cases, the Petitioners' property damage was settled shortly after the accident. Petitioners were required to sue the tortfeasor for their personal injuries in state court. There was no cause of action available to the Petitioners against the insurance company who was not named in the state court case. Oklahoma law has consistently held that an insurance company, as an insurer, cannot be joined with a tortfeasor in tort actions when liability insurance is involved unless the policy is required by statute, such as the policies that are required for motor carriers. *Holt v. Bell*, 392 P.2d 361, 362 (Okla. 1964). Because Petitioners

had no cause of action against the tortfeasor's insurance company, a legally unrelated third party, it is difficult to understand how the district court reached its conclusion that the statute of limitations began to run before the Petitioners had a cause of action against the insurance company. At the end of the state court trial, Petitioners had no idea that letters had been secretly sent to their medical providers and that in reliance of the misrepresentations in the letters, the medical providers had sent confidential medical records. However, upon the discovery of the letter on August 14, 2000, Petitioners immediately issued a subpoena to Ms. Davis (the tortfeasor-Defendant in the state court trial) for any and all communications and attachments relating to attempts to acquire medical records of the Petitioners. The Appellees filed a motion to quash said subpoena on the basis [inter alia] on the grounds that the subpoena was "fatally flawed," because Petitioners' subpoena lacked language required for subpoenas served on non-parties. 12 Okl. St. § 2004.1 is Oklahoma's civil procedures statute on subpoenas. The insurance company's motion to quash did not provide authority for quashing the subpoena based on the omitted language and apparently was another delaying tactic by the insurance company. The insurance company's motion to quash also requested a protective order requiring "enjoining the Petitioners or their attorney from making any further direct contact with the Defendant," which would necessarily fundamentally violate the statutes requirement that a subpoena must be served directly upon the Defendant. See 12 Okl. St. § 2004.1 (B)(1). See also *Waddle v. Waddle*, 1994 OK CIV, APP 1 868 P.2d 751, 65 OBJ 707, (1994), holding and quashing a subpoena because it was served on the party's attorney rather than directly upon the party. It is also interesting to note that here, at a stage months after the state trial was concluded, the insurance company made concerted efforts to shift the court's focus on production of medical records rather than the instruments used by the insurance

company to obtain said records. The Subpoena Duces Tecum served to Dana Elizabeth Davis, expressly sought, "PROVIDE ANY WRITING/RECORDING OF ANY KIND RELATING TO THE ATTEMPTS TO ACQUIRE MEDICAL RECORDS/INFORMATION OF JAMES M. ERIKSON AND PATRICK KILGALLEN." Appendix E p. 46a, Serial numbers 4583941 and 4599800. The record is abundantly clear that the Petitioners were diligently attempting to discover whatever method was utilized by the insurance company to obtain the Petitioners' medical records, as the Petitioners were never provided copies of any subpoenas or discovery requests by the Defendant as required by Oklahoma's Discovery Code. See 12 Okl. St. § 2004.1 (B)(1). The insurance company's motion to quash further delayed the Petitioners-Appellants discovering the fraudulent activity and thus their cause of action against the third party insurance company. Upon receiving a copy of the motion to quash the subpoena, Petitioners-Appellants issued and served a second subpoena directly upon the Appellees-insurance company's attorneys who very reluctantly provided copies of some 56 letters (identical except as to the addressee-recipient medical provider) which appeared to be a insurance company form letter developed by the insurance company attorneys or their staff. Interestingly, none of the letters produced by the insurance company attorneys included the court order referred to in said letters, which order Appellees represented entitled them to receive all medical records, and further compounds the extent of the Appellees' concealment, since the order waving medical privilege was not included with the items provided in response to the subpoena which required, "ANYTHING AND EVERYTHING USED IN REQUESTING ANY AND ALL INFORMATION WHATSOEVER RELATING TO PETITIONERS". No orders of waiver of medical privilege were provided.

The trial court erroneously applied the commencement of a statute of limitations for a cause in tort relating to discovery

of medical records at time of the state court trial, rather than the time of the discovery of the fraudulent activity, and hence the cause of action against the insurance company for committing the intentional misrepresentations and breaching the medical privilege. (See 43A Okl. St. § 1-109 medical privilege statute). Appellants would have no problem with this application of the statute of limitations applied to the physicians and pharmacies for tortuously providing all of Petitioners-Appellants' confidential medical records, but not applied to the third party insurance company who conducted the frauds in secret and effectively concealing the Petitioners' cause of action against the insurance company. In short, the trial court's application of Oklahoma's two-year statute of limitations would have required the Petitioners to file an action for the undiscovered and unknown frauds perpetrated in secret by a third party against who the Petitioners had not yet discovered they had a cause of action, and could not otherwise sue. The district court and adopted by the Tenth Circuit, applied the holdings in Samuel R. Noble Found., 840 P.2d at 626; and *Chasteen v. UNISI.4 JECS Corp.*, 216 F.3d 1212, 1217 (10th Cir. 2000), wherein the Petitioners could clearly see that there was an open and notorious defect with the tiles of a building and knew they had been damaged and the Defendant had not intentionally concealed the cause of action, unlike the present case wherein the Defendant affirmatively hid the cause of action by concealing the fraudulent letters from the Petitioners. Clearly there is an insufficient nexis between learning during at trial that there may be a breach of medical privilege (medical records referred to by Defense attorney at trial but not admitted into evidence) and discovery that there is a cause of action against a third party insurance company relating to (the fraudulent letters produced by the insurance company three months after the trial was concluded). Oklahoma's statute of limitations is clear and unambiguous, "an action for relief on the ground of fraud—the cause of action in such case shall not be deemed

to have accrued until the discovery of the fraud." 12 O.S. § 95 (3) (Appendix H p. 78a).

If for purposes of a 12(B)(6) motion the court had construed the pleadings in the light most favorable to Appellant, then August 14, 2000 would have been the earliest date the time for purposes of the statute of limitations would have commenced. Appellant submits the allegations were sufficient to overcome a Rule 12(B)6 Motion to Dismiss.

Appellants met the statute of limitation requirement under Oklahoma Law and in addition, "Equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice." *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 853 (Colo.1992).

We have applied the doctrine of equitable tolling where the defendant's wrongful conduct prevented the plaintiff from asserting his or her claims in a timely manner. *See, e.g., Garrett*, 826 P.2d 850 (tolling statute of limitations period where defendant employer failed to provide employee with report needed to file petition for workers compensation); *First Interstate Bank v. Piper Aircraft Corp.*, 744 P.2d 1197 (Colo.1987) (holding statute of limitations period subject to equitable tolling for fraudulent concealment of facts underlying wrong); *Strader v. Beneficial Finance Co.*, 191 Colo. 206, 551 P.2d 720 (1976) (tolling statute of limitations where defendant-lender knowingly withheld statutorily required disclosure of true interest rate to plaintiff-borrower); *Klamm Shell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968) (applying equitable tolling where plaintiff's mental incapacity, resulting from defendant's assault and battery, prevented timely filing of assault and battery charges). The principle underlying equitable tolling in these circumstances is that a person should not be permitted to benefit from his or her own

wrongdoing. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094 (Colo. 1996):

> The reasoning underlying these cases is that it is unfair to penalize the plaintiff for circumstances outside his or her control, so long as the plaintiff makes good faith efforts to pursue the claims when possible.

Here, as soon as the Petitioners thought there may be a problem with their medical confidentiality, they wasted no time in diligently pursuing an answer by subpoenaing the source of the mystery, the insurance company, Defendant herein. When the insurance company intentionally began sham delaying tactics to avoid producing the sought after information, the Petitioners swiftly issued a second subpoena directly to and served upon the insurance company attorneys for the records which was concealed and held by said insurance company.

It is uncontroverted by the Defendant insurance company that the content of the letters sent to Petitioners' medical providers were in fact misrepresentations of their entitlement to medical records covered by medical privilege and confidentiality.

"It is established that the two-year limitation period in § 95 Third will commence to run when the claim accrues, and the claim accrues when a litigant first could have maintained his claim to a successful conclusion. *Sherwood Forest No. 2 Corp. v. City of Norman*, 632 P.2d 368, 370 (Okla. 1980).

"Facially, § 95 Third clearly proscribes the bringing of an action or the filing of a claim to recover personal property more than two years after the cause of action or claim accrues."

"We agree with Weaver's assertions that his claim cannot accrue until he could first maintain an action to successful conclusion. The essence of this assertion is that identity of the defendant is an essential element to any cause of action." *See*

In re 1973 John Deere 4030 Tractor, 1991 OK 79, 816 P.2d 1126, 62 OBJ 2437 (Okla. 1991).

II. The decision of the Tenth Circuit in this case squarely conflicts with This Court's decision holding that Because respondents prevailed on a motion under Federal Rule of Civil Procedure 12(b)(6), we read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations".

Hishon v. King & Spalding, 467 U.S. 69, 73, 104 (See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 103 P.U.R.4th 513, 109 S.Ct. 2893, 106 L.Ed.2d 195, 57 USLW 4951, RICO Bus.Disp.Guide 7237 U.S.Minn. Jun 26, 1989).

Oklahoma state law permits approximately 5 forms of discovery, including interrogatories, requests for admissions, requests for production of documents, subpoenas and depositions. Each of these methods of discovery requires that the parties to the law suit are to be notified of discovery efforts using any or all of these methods. *See* generally 12 Okl. St. § 3226 *et seq*. And § 2004.1 (B)(1) (Appendix H p. 85a-94a).

After depositions by the insurance company attorneys of both Petitioners and discovering the names of all medical providers and pharmacies used by the Petitioners throughout their respective lifetimes, and including many different states, the insurance company sent the letters at issue to at least 56 medical providers and pharmacies of the Petitioners, representing that the insurance company and attorneys were entitled to all medical records of the Petitioners, due to a Oklahoma State court order waiving medical privilege. The Petitioners were not notified or sent copies of any of the letters sent by the insurance company employees, and it is

believed that their client (the tortfeasor) was not notified of their illegal discovery activities as well. At trial, it was clear that the purpose for obtaining the medical records was to use same to surprise and embarrass the Petitioners with their own medical records, unrelated to the injuries claimed in the accident, as a means of prevailing and avoiding paying damages wherever possible and still receiving insurance premiums at a profit. When it is the third largest insurance company in the United States that literally deals with the public on a scale of thousands of claims each year, the profitability of such RICO behaviors are abundant at the expense of said public.

"The Defendants have conspired or neglected to prevent said conspiracy, to establish and apply a pattern of practices and/or policies of unlawfully obtaining all medical records from all medical providers of claimants against Farmers, in violation of state and federal law." ¶ 1 Second Amended Complaint. This is clearly an allegation that anyone who makes a claim against Farmers was included, and was not limited to a single scheme limited to obtaining Appellants medical records only, but anyone who makes a claim, which is not restricted to a time frame of any kind, as strictly construed by the trial court and in violation of 12 (B)6 requirement that the pleadings be construed in a light most favorable to the Appellants. The ongoing threat exists that the practice of using fraudulent ex-parte communications/letters to circumvent the Oklahoma subpoena statute to obtain and exploit confidential and privileged medical information for profit, and the Appellees' conduct or practice is apparently so widespread within the enterprise, that even Appellee openly admitted in Appellees' Reply Brief that even their legal assistants (or secretaries) send out such ex-parte letters to medical providers of opposition litigants. pg. 7, Statement of the Facts, ¶ 1, 6-17-2004 Reply Brief of Appellees.

There is little if any doubt that the threat of future unlawful conduct against claimants continues to be an ongoing pattern of conduct and is highly likely to continue and persists, especially in light of the fact that the enterprise of Farmers is still conducting the business of insurance and has not disbanded. These are the types of racketeering activity contemplated to be prevented by RICO.

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with the threat of repetition.

Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (CA3 1987).

The Appellants allege a RICO violation in their Complaint and have the opportunity to prove continuity over a closed period by proving a series of related predicates extending over a substantial period of time.

In *H.J. Inc.* at 242, this Court stated:

> A threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise.

In *H.J.*, Justice Scalia concurring quoted from *Sedima* stated that:

> For Terms ago . . . we gave the lower courts four clues concerning the meaning of the enigmatic term "pattern of racketeering activity". They are as follows:
>
> First, we stated that the statutory definition of the term in 18 U.S.C. § 1961(5) implies "that while two acts are necessary, they may not be sufficient." *Sedima*, 473 U.S., at 496, n. 14. Second, we pointed out that "two isolated acts of racketeering activity," "sporadic activ-

> ity," and "proof of two acts of racketeering activity, without more" would not be enough to constitute a pattern. *Ibid.* Third, we quoted a snippet from the legislative history stating "[i]t is this factor of *continuity plus relationship* which combines to produce a pattern." *Ibid.* Finally, we directed lower courts' attention to 18 U.S.C. § 3575(e), which defined the term "pattern of conduct which was criminal" used in a different title of the same Act, and instructed them that "[t]his language may be useful in interpreting other sections of the Act," 473 U.S., at 496, n. 14.

Id. at 251.

Because the Complaint is sufficiently particular and because there remains questions of material fact as to when the RICO claims accrued so as to begin the running of the statute of limitations, there is a question of material facts to be decided by the lower court.

The statute of limitations for RICO claims is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). The crucial issue here is when the alleged RICO claims accrued to Appellants so as to begin the running of the four year statutes.

In *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), the Third Circuit stated that a RICO claim accrues after the occurrence of the last predicate act in the pattern of racketeering. The statute of limitations begins to run from the date "plaintiff knew or should have known" that the elements of a civil RICO cause of action existed, "unless further injury to the plaintiff or further predicate acts occur" in which case the accrual period runs from the time when the "plaintiff knew or should have known of the last injury or the last predicate act" which was part of the same pattern of racketeering activity. *Keystone Ins. Co.*, 863 F.2d at 1130.

In consideration of the above authority, Appellants submit that they have pleaded a sufficient number of claims (well

over the predicate two and including some 56 fraudulent letters written by the Defendants to unlawfully obtain medical records protected by privilege), to establish a RICO claim and that they should be allowed to pursue their RICO claims against Appellee, and to have the opportunity to discover and prove whether their theory that more fraudulent activity by these Defendants' enterprises has been conducted in secret. The Complaint does set forth facts sufficient to provide evident to support their claims. Thus, the Court should reverse the Tenth Circuit's ruling of October 18, 2005 and the trial court's ruling.

Never the less, the Tenth Circuit concluded that even though there was an ongoing pattern 56 or more potential violations of law by the insurance company, the Petitioners' were unable to allege a pattern for purposes of RICO.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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